No. 83-1400

In the Supreme Court of the United States

OCTOBER TERM, 1983

BISCAYNE FEDERAL SAVINGS & LOAN ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the statutory requirements (12 U.S.C. 1729(b)) for the appointment of a federal receiver for a federally-chartered savings and loan association were satisfied.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 720 F.2d 1499. The district court's opinion on the merits (Pet. App. 18-143) is reported at 572 F. Supp. 997, and its opinion of April 12, 1983 (Pet. App. 144-152) is reported at 561 F. Supp. 1046. The district court's opinion of May 6, 1983 (Pet. App. 153-154) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1983 (Pet. App. 162), and was amended on December 5, 1983 (Pet. App. 164). The petition for a writ of certiorari was filed on February 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises from the appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for petitioner Biscayne Federal Savings & Loan Association (Biscayne), a federally-chartered savings and loan association. The district court held that the Federal Home Loan Bank Board[1] (Bank Board) acted unlawfully in appointing FSLIC as receiver. The court of appeals reversed, concluding that the Bank Board's appointment of the FSLIC as receiver for the insolvent association[2] complied with the requirements of 12 U.S.C. 1729(b) and was authorized by 12 U.S.C. 1464(d)(6)(A) (Pet. App. 8-12).

2. Beginning in July 1981, Biscayne began experiencing severe operating losses. It suffered 21 consecutive months of losses before the Bank Board exercised its express statutory authority to appoint FSLIC as receiver. During this 21-month period, Biscayne's net worth fell from positive $31 million to negative $29 million (Pet. App. 15 n.2). Out of the nation's 3,311 FSLIC-insured associations, Biscayne was one of only 69 that were insolvent as of January 1983 (Pltff. Exh. 149). Indeed, it was the second most deeply insolvent association in the country at that time (*ibid.*).

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[1]The Bank Board is an independent agency of the Executive Branch of the United States that is responsible, pursuant to Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. 1464(a). The Bank Board is also the operating head of FSLIC, the corporate governmental agency of the United States that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

[2]Petitioners stipulated that Biscayne was insolvent within the meaning of the statute at all pertinent times (Pet. App. 4, 15 n.3).

Petitioners and the Bank Board staff had three phases of extensive discussions on proposals to resolve Biscayne's difficulties. In Phase I, from late 1981 to July 1982, Biscayne's controlling shareholder, petitioner Kaufman & Broad, Inc. (KB), sought repayable FSLIC assistance (Pet. App. 39-43). In Phase II, from August 1982 to January 1983, Biscayne sought approval to sell eight of its branches to another association.[3] Biscayne was already insolvent at this point (Pet. App. 15 n.2). In Phase III, from January through March 1983, KB sought a $25 million nonrepayable gift of public funds from FSLIC to help restore Biscayne to solvency. By the end of March 1983 Biscayne was insolvent by more than $29 million (Pet. App. 15 n.2).

On April 5, 1983, a letter from KB's counsel to the Bank Board provided a stark description of Biscayne's bleak financial condition (Def't Exh. 69):

> Biscayne's net worth position is closer to a negative $35 million than $25 million; * * * its mortgage loan portfolio is concentrated in high rise southern Florida condominiums owned in high percentage by foreigners, * * * its currently realized yields have deteriorated and its delinquency rates are inordinately high; * * * its cost of funds is higher than its competitors because of Biscayne's need to compete aggressively for funds to compensate for outflows caused by publicity relating to its condition that Biscayne was forced to release; * * * its heavily collateralized, high yield long-term debt carries substantial prepayment penalties; * * *

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[3]The convoluted details of the branch sale proposal are set out at Pet. App. 50-51. In sum, the proposal was, as petitioners' own senior official testified, "simply an accounting gimmick" (Tr. 471) to add $56 million to Biscayne's net worth without any capital infusion. In the first year alone, that "gimmick" would have resulted in a net increase in Biscayne's costs of $6.8 million (Pet. App. 51).

most branches are not owned and many are held under short-term leases; and so forth.

The following day, the Bank Board rejected KB's proposal for a $25 million FSLIC gift of public funds and appointed FSLIC as receiver on the grounds that Biscayne was insolvent and in an unsafe and unsound condition to transact business (Pet. App. 155-156).

3. Petitioners commenced this action on April 6, 1983, in the United States District Court for the Southern District of Florida challenging the Bank Board's action pursuant to 12 U.S.C. 1464(d)(6)(A). The district court issued a preliminary injunction on April 12 barring the Bank Board and FSLIC pendente lite from exercising their express statutory powers under 12 U.S.C. 1729 to sell Biscayne to a financially strong institution that could restore and maintain its solvency (Pet. App. 144-154).

On September 9, 1983, the district court issued an order continuing its earlier injunction and holding that the staff of the Bank Board had acted arbitrarily, capriciously and outrageously during the Phase III negotiations, from mid-January through mid-March, 1983. Specifically, the district court found that the staff had (a) misled KB's counsel into believing that the Bank Board would approve KB's nonrepayable assistance proposal and (b) failed to tell KB's counsel that the staff would not recommend its approval to the Bank Board (Pet. App. 121-122). The district court, however, did *not* find any causal connection between the described staff misconduct and either Biscayne's insolvency or the Bank Board's April 6 decision to appoint a receiver. Indeed, the district court expressly found that neither the Bank Board nor its staff was guilty of any conduct causing Biscayne's insolvency (Pet. App. 87-88; see Pet. App. 9 and 16 n.6). Nevertheless, the district court held that the staff's misconduct in negotiating with KB's counsel must be

"imputed" to the Bank Board (Pet. App. 118) so as to render the Bank Board's subsequent appointment of a receiver unlawful (*id.* at 123).

Respondents appealed from both the April 12 and September 9 orders. The court of appeals unanimously reversed, vacated both orders and denied petitioners' cross-appeal.[4] Relying on the express statutory authorization in 12 U.S.C. 1464(d)(6)(A) for appointment of receivers for insolvent associations, the congressional policy judgments that led to that statutory grant of authority, and the consistent decisions of the Seventh and Ninth Circuits, the Eleventh Circuit held that petitioners' stipulation that Biscayne was insolvent by approximately $30 million when the Bank Board appointed a receiver was fatal to petitioners' claim. The Eleventh Circuit directed that the mandate issue forthwith (Pet. App. 163, 165). Petitioners filed a motion to recall the mandate and for a stay while their anticipated petition for a writ of certiorari was pending. The court of appeals denied the motion on December 20, 1983. The petition for a writ of certiorari was not filed until February 23, 1984, well after Biscayne had been merged without any requirement of FSLIC assistance (R. 1795-1796).

ARGUMENT

The issues raised in the petition were fully considered and correctly decided by the court of appeals. The decision does not conflict with any decision of this Court or of any other court of appeals. Indeed, the only other appellate decisions that have addressed the question presented here were expressly followed by the Eleventh Circuit. *Telegraph Savings & Loan Association* v. *Schilling (Telegraph)*, 703 F.2d 1019 (7th Cir.), cert. denied, No. 83-244 (Nov. 28, 1983);

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[4] In their cross-appeal, petitioners contended that the Bank Board should have used a remedy less drastic than receivership.

Fidelity Savings & Loan Association v. *Federal Home Loan Bank Board (Fidelity)*, 689 F.2d 803 (9th Cir. 1982), cert. denied, No. 82-1320 (May 2, 1983). Accordingly, further review by this Court is not warranted.

1. Petitioners contend (Pet. 20-25) that the decision below conflicts with congressional intent and with this Court's decisions. This contention is based on petitioners' mischaracterization of the Eleventh Circuit's decision as barring judicial review under 12 U.S.C. 1464(d)(6)(A).

a. Contrary to petitioners' assertion (Pet. 21), the court of appeals did not hold that Section 1464 "excludes any aspect of review of a receivership appointment." Rather, the Eleventh Circuit held that judicial review is available (Pet. App. 8-12); it concluded, however, as had the Seventh and Ninth Circuits, that such scrutiny is limited to determining whether the Bank Board abused its discretion in determining that one or more of the grounds specified by Congress for appointing a receiver exists (Pet. App. 8-9):[5]

> We find that in actions brought under § 1464(d)(6)(A), the sole question properly before the district court and this Court is whether a statutory ground authorizing the appointment of the FSLIC exists. * * * When one of the stated grounds relied upon by the Board is statutory insolvency, as is the case

[5]Section 5 of the Home Owners' Loan Act, 12 U.S.C. 1464(d)(6)(A), provides in part:

> The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (1) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; * * * The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association.

here, the issue for the courts should be a straightforward one: whether the association in question was statutorily insolvent at the time of the FSLIC's appointment.

In this case statutory insolvency was established at the first pre-trial hearing in the district court, since plaintiffs at that time stipulated to the fact of Biscayne's insolvency as of April 6, 1983.

As the Eleventh Circuit noted (Pet. App. 8), the "awesome amount of control and authority" over federal associations that Congress has vested in the Bank Board — including the power to appoint a receiver for an insolvent association — is "an integral part of the congressional plan to protect depositors * * * and to restore the public faith in financial institutions which was eroded by the monetary crisis of the Depression" and reflects congressional recognition "that swift action is often necessary to minimize economic loss in instances of troubled and failing financial institutions." Congress made the policy decision that insolvency is an emergency (Pet. App. 105, 108) justifying the exercise of the Bank Board's authority to appoint a receiver; accordingly, it gave the Bank Board discretion to appoint a receiver where such a condition exists.[6] The Eleventh Circuit, in line with the Seventh and Ninth Circuits, properly declined to ignore this congressional judgment and substitute its own view of whether a receiver "should be" appointed.

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[6]Indeed, Congress expanded the Bank Board's powers to appoint a receiver ex parte and without notice in the Financial Institutions Supervisory Act of 1966. Prior to the 1966 amendments to 12 U.S.C. 1464(d), the Bank Board could only appoint ex parte a "Supervisory Agent", and only upon a finding that an "emergency" existed. See S. Rep. 1482, 89th Cong., 2d Sess. 13-14 (Aug. 18, 1966).

b. The decisions of this Court, as well as the legislative history of 12 U.S.C. 1464(d)(6)(A), support the Eleventh Circuit's holding. As petitioners concede (Pet. 29), "*Vermont Yankee [Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978)] admonishes courts not to reexamine congressional policy choices." Following *Vermont Yankee* and the Seventh Circuit's decision in *Telegraph*, the Eleventh Circuit properly declined to accept petitioners' invitation to make such a re-examination. The decision below also accords with this Court's decision in *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 185 (1973) ("where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence' ").

c. The decisions of this Court relied upon by petitioners (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Fahey* v. *Mallonee*, 332 U.S. 245 (1947)) do not conflict with the opinion below. The *Abbott Laboratories* line of cases holds simply that foreclosure of judicial review is not to be lightly implied. The Eleventh Circuit did not foreclose judicial review. Under its ruling petitioners were free to challenge whether one or more of the statutory grounds, *e.g.*, insolvency, existed on April 6, 1983. If anything curtailed judicial review in this case, it was petitioners' decision to stipulate that Biscayne was insolvent (Pet. App. 12).

Fahey v. *Mallonee*, 332 U.S. 245 (1947), is irrelevant to the issues presented in the petition. As petitioners point out (Pet. 22), *Fahey* involved a substantially different statutory pattern and no question of judicial review was before the Court. Moreover, the dicta cited by petitioners (Pet. 22) concerning the refusal to foreclose a remedy against hypothetical malicious conduct (332 U.S. at 256-257) is of no consequence here where the district court found that the

staff had not acted vindictively (Pet. App. 123) and there was no suggestion that the Bank Board acted maliciously in appointing a receiver for an association insolvent by some $30 million..

2. Contrary to petitioners' suggestion, the district court did not find that the Bank Board was arbitrary and capricious in deciding to appoint a receiver on April 6, 1983. Instead, the district court found that members of the staff acted arbitrarily beginning in January 1983 (Pet. App. 119) only with regard to KB's request for nonrepayable FSLIC assistance. Biscayne was already insolvent by more than $22 million in January 1983 (Pet. App. 15 n.2), before any staff action the court deemed arbitrary. As the Eleventh Circuit stressed, there was no intimation that any staff misconduct contributed to Biscayne's insolvent status as of April 6, 1983 (Pet. App. 9).[7] Moreover, the district court specifically found that the Bank Board did not have available to it a less drastic remedy to cure Biscayne's insolvency (Pet. App. 99).

3. Petitioners incorrectly argue (Pet. 25-30) that the court of appeals decision has created a conflict among the circuits. In fact, every court of appeals that has considered Bank Board appointments of receivers has ruled in favor of the Board. *Telegraph*; *Fidelity*.

In the face of this unanimity of authority, petitioners base their "conflict" argument (Pet. 25-26) on decisions construing the National Bank Act, 12 U.S.C. 1 *et seq.*, not the Home Owners' Loan Act. The National Bank Act, unlike 12 U.S.C. 1464(d)(6)(A) and 1729, does not provide explicitly

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[7]The Eleventh Circuit noted (Pet. App. 13) that the issue of alleged staff misconduct, if any existed, might be relevant in petitioners' existing suits against staff members pending in the district court. Petitioners' suggestion (Pet. 24 n.17) that this portion of the opinion shows that the court of appeals "harbored constitutional concerns about the agency's action" is absurd.

for judicial review when the Comptroller of the Currency appoints a receiver for a national bank. Accordingly, the courts have split as to whether any judicial review is available when a receiver is appointed for a national bank (Pet. 25-26 & n.20). That split of authority under a different statutory regime is irrelevant to this case.

The only other purported conflict advanced by petitioners is with two district court opinions: *Washington Federal Savings & Loan Association* v. *Federal Home Loan Bank Board (Washington Federal)*, 526 F. Supp. 343 (N.D. Ohio 1981) and *Fidelity Savings & Loan Association* v. *Federal Home Loan Bank Board*, 540 F. Supp. 1374 (N.D. Cal.), rev'd, 689 F.2d 803 (9th Cir. 1982), cert. denied, No. 82-1320 (May 2, 1983). As the Eleventh Circuit explained (Pet. App. 11-12), however, *Washington Federal* is not inconsistent with the decision below.[8] The district court decision in *Fidelity* was, of course, reversed by the Ninth Circuit.

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[8]Petitioners argue (Pet. 27) that the district court in *Washington Federal*, after finding that one of the statutory grounds for appointing a receiver existed, proceeded to decide whether other factors were relevant. This is a mischaracterization. In fact, after it found that the Bank Board had before it evidence that rationally supported its determination that Washington Federal was in "an unsafe or unsound conditions to transact business" — one of the five grounds listed in 12 U.S.C. 1464(d)(6)(A) for appointing a receiver — the district court went on to consider various factors that the plaintiff-association claimed the Bank Board had failed to consider. The court concluded that this contention was irrelevant to the question whether a statutory ground for appointment existed. 526 F. Supp. 388-390, 400-402. Thus, the district court's decision in *Washington Federal* is consistent with the court of appeals' decision here — each court held that judicial review is limited to the question whether the Bank Board abused its discretion in concluding that one or more of the statutory grounds for appointing a receiver exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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